No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars (a copartnership),
Appellants,

vs.

Park, Benziger & Co., Inc. (a corporation),
Appellee,

and

Park, Benziger & Co., Inc. (a corporation),
Cross-Appellant,

vs.

Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars (a copartnership),
Cross-Appellees.

CROSS-APPELLANT'S OPENING BRIEF.

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CROSS-APPELLANT'S OPENING BRIEF.

INTRODUCTION.

This is an action by the buyer (plaintiff-appellee-cross-appellant) for breach of a contract to sell wine. The contract appears at R. 76-82.

There have been two trials of the case. On the first trial, the jury returned a verdict for $91,500, and the District Judge granted a new trial. The second jury brought in a verdict for $72,687.50, on which judgment was entered. Defendants appealed from this judgment.

Plaintiff is satisfied with the verdict although it is somewhat smaller than the first verdict. *Plaintiff's cross-appeal is taken only to protect itself in the event of a third trial.* (R. 549.) Since the court followed the defendants' theory of law on the second trial and almost all intermediate rulings were in defendants' favor, there seems to be no reason whatever for setting the verdict aside. *In the event of an affirmance on defendants' appeal, plaintiff desires the cross-appeal to be dismissed.*

The cross-appeal virtually covers the points which plaintiff would make on an appeal from the order granting a new trial, were such an appeal possible. In other words, the first trial was tried on the plaintiff's construction of the contract and on plaintiff's theory of evidence. The trial court changed its mind about this, granted a new trial and tried the second trial upon the defendants' theory of law. While even that resulted in a plaintiff's verdict, which we believe should unquestionably be affirmed, plaintiff out of an abundance of caution has cross-appealed so that if by any chance there should be a third trial plaintiff will be permitted to present it (like the first trial) upon plaintiff's rather than defendants' legal theory.

STATEMENT OF JURISDICTION.

This case was tried in the United States District Court for the Northern District of California, Southern Division. Federal jurisdiction rests on diversity of citizenship. Plaintiff is a New York corporation (amended complaint Par. II, R. 10); plaintiff's assignor is a resident and citizen of New York. (Amended complaint Par. III, R. 10.) Defendants are residents of the City and County of San Francisco, State of California. (Amended complaint Par. IV, R. 10-11.)

The *ad damnum* clauses and prayers of both complaint and amended complaint are for more than $3000 (R. 6, 7, 13, 14) as is the judgment. (R. 68.)

Jurisdiction of the trial court rests upon 28 U.S.C.A. 41(1); jurisdiction of the Circuit Court of Appeals upon 28 U.S.C.A. 225(a). See also Rules 74, 75(k) of Federal Rules of Procedure.

STATEMENT OF THE CASE.

On January 29, 1943, defendants and plaintiff's assignor (Serge Hermann) entered into a contract by which defendants were to sell and deliver 60,000 cases of wine to Hermann. (R. 76-82.) The contract was modified by letter on February 3, 1943, defendants making certain additional representations (R. 21, 82-3), and was assigned to the plaintiff on February 25, 1943. (R. 83.) The original contract was drafted by one W. G. Evans (R. 171), an agent and employee of the defendants. (R. 374.) The second and third paragraphs of the contract provided as follows:

"Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holidays a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy	7,167 cases of 12 bottles of fifths per case
Claret	7,145 cases of 12 bottles of fifths per case
Rhine Wine	6,587 cases of 12 bottles of fifths per case
Sauterne	4,095 cases of 12 bottles of fifths per case
Sherry	834 cases of 12 bottles of fifths per case
Port	863 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agred upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents ($5.25) per case and the sweet wines at Six Dollars ($6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents ($5.50) per case for dry wines and Six Dollars and twenty-five cents ($6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the

amount of the sale, which has not been bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945."

Subdivision Eleventh of the contract expressly makes the contract bind assignees. (R. 81.)

On April 27, 1943, after partial performance by plaintiff and before deliveries commenced, the defendants committed an anticipatory breach of the contract by announcing that they would make no deliveries under it. (R. 120-122.)

First: At the first trial, the court submitted the issue of damages to the jury upon the basis of the total amount mentioned in the contract—60,000 cases. Upon the second trial, the court held the contract too indefinite as to everything except the quantities already bottled (listed in paragraph Third, R. 78), totalling 26,691 cases. So the issue of damages was submitted to the second jury on the basis of only 26,691 cases.

Second: At the first trial the court permitted plaintiff to introduce evidence upon two alternative theories of damages: (a) *loss of profits* if the jury should find the wines had no market value, and (b) prices obtained by defendants on sales to other cus-

tomers of the wines covered by the contract, as tending to establish market price of wine on one hand or actual value on the other. This evidence tends to fix the difference between the contract price and market price or between the contract price and actual value if the jury should find the wines either had or had not a market value.

On the second trial the plaintiff was limited to evidence of loss of profits. Evidence of the defendants' sales of the wines covered by the contract was excluded.

It is plaintiff's contention that the procedure of the first trial was correct in that:

(1) The jury should have been instructed to calculate damages on 60,000 cases;

(2) Plaintiff should have been permitted to prove the prices obtained by the Bercuts from other customers.

(In our appellee's brief on defendants' appeal, we shall show that inasmuch as the second trial was held upon *defendants'* theory, the judgment should be affirmed. If the judgment is affirmed, the cross-appeal need not be considered.)

I. THE ISSUE OF DAMAGES SHOULD HAVE BEEN SUBMITTED ON THE BASIS OF 60,000 CASES.

A. REFERENCE TO GROUND OF APPEAL.

Plaintiff's first ground of appeal presents the proposition that the issue of damages should have been submitted on the basis of 60,000 cases:

> (R. 548-9) "1. Under a proper construction of the contract between the parties the court should have submitted the issue of damages to the jury on the basis of 60,000 cases instead of only 26,691 cases."

B. INSTRUCTIONS AND REQUESTS FOR INSTRUCTIONS RAISING THIS ISSUE.

The issue whether damages should be calculated on 60,000 or on 26,691 cases was presented by plaintiff's requested instructions and by the instructions which the trial court refused and gave.

The charge of the court was as follows:

> (R. 519-20) "Although the agreement dated January 29, 1943 purports to be for the sale of 60,000 cases of wine, a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be determined by future negotiations which never took place. Under such circumstances, the contract must be treated as and for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine."

This was defense request No. 38 (R. 63-4) to which plaintiff excepted at R. 489:

> "The next one is 38. We except to that the same way that we except to the modification of our instruction No. 1 that reserved the earlier point."

Plaintiff's request No. 1 (R. 25) appears in the appendix of this brief. The court's modification is stated at R. 471:

> "I shall give plaintiff's instruction No. 1 striking out on lines 15 and 16 the words 'to sell and deliver 60,000 cases of wine'."

The exception of this modification is taken at R. 484-5:

> "Mr. Olshausen. For the record, in the instructions given but modified, we except to the modification of instructions 1, 3, 11 and 15. That merely preserves the point on which the new trial was granted in the first place.
>
> The Court. Yes."

Other instructions given and refused, raising the same issue, together with plaintiff's exceptions and the charge as given, are set forth in the appendix.

C. CONTRACT FIXED PRICE DEFINITELY, SO THAT DAMAGES SHOULD HAVE BEEN SUBMITTED ON 60,000 CASES.

26,691 cases were already bottled at the time the contract was executed. On these, the 1943 price was to be $5.25 per case for dry and $6.00 per case for sweet wines. The 1944 prices were 25 cents per case higher for each type of wine. (R. 78.)

As to unbottled wine the contract provides:

> (R. 78-9) "The balance of the amount of the sale which has not been bottled is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto *whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration,* and the prices governing the remainder of

the transaction *will be determined on the light of conditions existing during the year 1945.*" (Italics added.)

On the second trial, the court held that these provisions were so indefinite that they failed to fix a price for the unbottled wine. Accordingly it instructed the jury to disregard this part of the merchandise in fixing damages.

Under the authorities, the price for unbottled goods was definite enough. The issue of damages should have been submitted as to the entire lot. This conclusion rests upon three propositions of law:

(a) In case of doubt, a contract is to be construed so as to give it validity;

(b) Defendants drafted the contract and doubts must be resolved against the party who drafted the instrument;

(c) Price is fixed with sufficient definiteness where it is provided that a base price may be modified according to future market conditions.

Defendants claimed and the court charged (Def. request 38, supra) that price of the unbottled lot had been left *entirely* to future negotiations, and therefore no price had been fixed. Under rules of construction (a) and (b) above any ambiguities in the contract must be resolved to bring it within rule (c) above, rather than to make it void for uncertainty.

Specifically, the question is, which part of the contract should control? Should the words "but subject to negotiations between the parties" (R. 79) be read

without regard to the context? Or should they be read together with the clause "whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration, and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945"? Or in the event the two clauses are thought inconsistent, should the latter control as favoring the plaintiff and giving validity to the contract?

We now give the authorities supporting our three legal propositions:

1. Ambiguities in contract must be interpreted to give it validity.

The contract provides that questions of construction shall be governed by California law. (Clause Eleventh, R. 81.) A contract must be construed to give it validity rather than to make it void.

> *Civil Code* 3541:
>
> "An interpretation which gives effect is preferred to one which makes void."
>
> *Civil Code* 1643:
>
> "Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

California decisions have uniformly followed the principles of these two sections. Compare:

Long Beach Drug Co. v. United Drug Co., 13 Cal. (2d) 158, 166 (applying these sections to the question whether a contract was definite enough to be valid);

Entremont v. Whitsell, 13 Cal. (2d) 290, 297;

Robbins v. Pac. Eastern Corp., 8 Cal. (2d) 241, 272-3.

See also

Civil Code, Sec. 1641:

"a contract should be construed to give effect to all its parts."

2. Ambiguities in contract must be resolved against party who drafted instrument.

Civil Code, Sec. 1654, provides in part:

"1654. *Words to be taken most strongly against whom.* In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

This section states the familiar rule that ambiguities in a contract must be resolved against the party who drafted the instrument. California authorities upon this point are:

Weil v. California Bank, 219 Cal. 538, 541;

Cockrill v. Boas, 213 Cal. 490, 493;

Robert Marsh & Co., Inc. v. Tremper, 210 Cal. 572, 574;

Payne v. Neuval, 155 Cal. 46, 50.

3. Contract valid as one in which base price is varied according to future market fluctuation.

As already indicated, the defendants contended that the phrase "but subject to negotiations between the parties hereto" was exclusively controlling. From this they argued that the price was left wholly to the parties' unrestricted negotiations, and that the contract was therefore invalid because of failure to fix a price.

The plaintiff's position is, *first,* that the above phrase cannot be read alone but must be taken in conjunction with or subject to the text which follows it; *second,* that the text which follows fixes the price with enough definiteness to make a contract.

a. Clauses in paragraph "Third" must be read together.

As already stated defendants rely on the phrase "subject to negotiations between the parties" and disregard all the rest of paragraph Third. (R. 78-9.) But paragraph Third contains other provisions both before and after this phrase about negotiations. In its first paragraph, it names the prices of bottled goods. Then it says that the prices of unbottled goods shall be in the same proportion as between sweet and dry wines. (R. 79 top.) So here is one element which is made categoric and not left to negotiations at all. The relation between prices of unbottled sweet and dry wines shall remain the same as with the bottled goods. Any ambiguity in the language "is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations etc." must likewise be resolved (1) in favor of the validity of the con-

tract and (2) against the defendants. Viewed in this light, the clause evidently means that prices shall remain the same, except as modified under subsequent provisions of the contract. Then after the phrase "subject to negotiations" come the provisions telling what the negotiations are to be about. (See quotation pp. 8-9, supra.) The italicized part (p. 9, supra) says that fluctuations in elements of labor and production costs shall be reflected in the 1945 sale price. We show further on that taken alone, such a provision fixes the price definitely enough to sustain a contract. (Infra, p. 16.)

In the present contract this latter clause must either be taken as limiting the phrase "subject to negotiations between the parties", or (if there be thought to be an inconsistency) as controlling the construction of the contract.

(1) There is actually no inconsistency between the two clauses. The first ("subject to negotiations") makes the general proviso that although 1945 prices shall be in the same proportion as before, certain matters are left open to negotiation. The last part of clause Third gives the specific limits of these negotiations. These specific limitations modify the general provision under the well-known rule that "Particular expressions qualify those which are general". (Civ. Code, Sec. 3534.) Taking the specific language as qualifying the general, we find that the contemplated "negotiations" cover nothing more than (1) ascertaining the changes (if any) which by 1945 may have occurred in the labor and production cost elements of

wine production, and (2) modifying the original prices so as to reflect these changes.

Since the two parts of the last paragraph of clause Third *may* thus be read together, they *should* be. (Civ. Code, Secs. 1641, 3534, supra.) Its validity must be tested on that basis.

(2) If the general phrase "subject to negotiations" should be thought inconsistent with the later provision for varying the price according to market fluctuations, then the question is, which must control? Civil Code Section 1652 sets forth the rule for resolving repugnancies in a contract:

> "1652. *Repugnancies, how reconciled.* Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

"The general intent and purpose of the whole contract" *was undeniably to contract with respect to the entire 60,000 case lot.* This is shown *first* by the language in clause "First". (R. 77.)

> "First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under the terms and conditions to be mutually agreed upon."

The general intention to make a contract covering the entire lot is evinced *secondly* by the simple fact that the contract makes special provisions for the

unbottled part (e.g., clause Third, supra). The parties did not insert these clauses merely to fill paper.

So here the rule for interpreting repugnancies coincides with the rule that "an interpretation which gives effect is preferred to one which makes void". If there is any inconsistency between the phrase about "negotiations" and the other provisions for making the 1945 price reflect cost fluctuations, the latter must control. They are the part tending to make a valid contract.

This conclusion is further confirmed by the rule that ambiguities must be construed against the side which drafted the instrument.

(3) So from either standpoint, the interpretation adopted by the defendants and the trial court is incorrect. The phrase about "negotiations" cannot be taken alone, much less as controlling. The subsequent sentences are specific provisions which qualify it. They are the ones which determine whether the price has been fixed with sufficient definiteness. If, however, the general and specific provisions are held inconsistent, the latter still control as giving effect to the contract, as carrying out the general intention of the parties respecting the contract, and as embodying the construction favoring the side which did not draft the instrument. From any viewpoint, the specific provisions are the ones which determine whether the contract sufficiently fixes its price.

We now come to the proposition that prices are determined definitely enough if they are made to depend upon further market conditions.

b. Prices fixed according to calculations based on future market conditions support a contract.

The latter part of clause Third provides that "increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine shall be considered and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945".

A base price had been fixed for the earlier sales. The above quoted statement provides in effect that this base price shall be raised or lowered according to the increase or decrease of the elements entering into the cost of production of wine. As such, it is a sufficient determination of price. Compare the following authorities:

In *U. S. v. Swift & Co.,* 270 U. S. 124, 70 L. ed. 497, there was no original base price at all. Determination of price was left wholly to future negotiations, which were, however, to take account of the items entering into the cost of production. *Held:* That the price was fixed with sufficient definiteness to allow damages based upon the difference between the contract and the market price. Chief Justice Taft, after reciting findings dealing with market fluctuations, said for the unanimous court:

> (pp. 140-41) "It was evidently impossible to make a contract fixing the price of the bacon in advance of the partial performance of it, and the price was therefore left to subsequent adjustment. The Food Administration, by its regulations had already determined that the profit of the seller

> should not exceed 9 per cent of the investment or 2½ per cent of the gross sales. Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price. In such a case a reasonable price is presumed to have been intended."

The data available to fix price in this case were much the same as in the case at bar. In the case at bar there was a previous base price, and an agreement that the 1945 price should be reached by raising or lowering the base price according to the increase or decrease of the cost items. In *U. S. v. Swift & Co.*, the percentage of the buyer's profit had been fixed and the exact price left to determination from the fluctuations of the market. That is, in both cases there was one fixed item and the price was to be ascertained by combining this item with calculations based upon varying market prices or costs.

Just as much as price was determined with sufficient definiteness in *U. S. v. Swift & Co.*, so it is determined with sufficient definiteness here.

Another case upholding the same principle is *Kann v. Wausau Abrasives Co.*, 81 N. H. 535, 129 Atl. 374. There the parties started with a base price of $45 per ton, which was made subject to yearly revision according to changes in the cost production (labor, materials and supplies). This is strikingly similar to the provisions of the instant contract.

> (p. 378) "The price also is certain, the rule being that, 'either in an executory contract to sell or in a sale, the parties may provide for some means of determining the price later by outside circum-

stances.' 1 Williston, Sales, Sec. 167. The varying element, or outside circumstance, in the present instance, is the increased cost of production due to advances in labor, material, and supplies. The price is to be fixed annually during the five-year period, but the basal figure remains at $45 per ton. This being so, the price is 'capable of judicial ascertainment' (Solter v. Leedom & Worrell Co., 252 F. 133, 134, 164 C.C.A. 245) and is therefore sufficiently exact. The option being in effect a continuation of the original contract, the provisions relating to credits and deliveries are the same. These provisions are definite."

In *Allen v. Sams,* 120 S. E. 808 (Ga. App.), the price of the goods was made dependent upon calculations based on a future market price (120 S. E. 808, 809 par. 8 of the quoted complaint). Holding this sufficiently definite, the court says:

(p. 808) "The fact that the price of goods sold and delivered was to be ascertained subsequently by the condition of the market within a specified time at a particular place, does not affect the validity or completeness of the sale, unless for some reason the ascertainment by the terms of the contract becomes impossible." (Syl. by Court.)

The following are other cases affirming the same principle.

In *United Lumber Yards Inc. v. Modesto Irr. Dist.,* 23 Cal. App. (2d) 130, the contract provided:

"It is hereby agreed that should the price per barrel of Tufa Cement, *on the open market dur-*

> *ing the life of this contract,* be reduced lower than the price bid per barrel for Tufa Cement in this contract, that the Modesto Irrigation District shall have the benefit of such reduction." (Court's italics.)

Damages were granted upon this price provision.

In *Memphis Furniture Co. v. Wemyss Furn. Co.,* 2 Fed. (2d) 428, 432 (C.C.A. 6), the contract price was fixed as the market price at the date of delivery which was held to furnish enough data to determine price and was therefore sufficiently definite.

Shell Oil Co. of Cal. v. Wright, 167 Wash. 197, 9 Pac. (2d) 106, where the contract provided (p. 107) " 'said tank wagon price being no cents per gallon less than the sublessor's tank wagon price for commercial gasoline * * *' ". *Held:* the contract was not invalid because it left the price to be fixed by one of the parties. (9 Pac. (2d) 106, 109).

Johnson Oil Ref. Co. v. Elder, 96 Colo. 314, 42 Pac. (2d) 610, same;

Buggs v. Ford Motor Co., 113 Fed. (2d) 618, holding it sufficient to agree to " 'sell at such list prices as [one party] shall from time to time determine'."

These cases show that price is sufficiently determined if it is based on calculations of a future market price. In particular is this so where a base price is to be varied according to future market fluctuations.

4. Summary.

With ambiguities resolved in favor of the validity of the contract and against defendants who drafted it, the contract fixes a base price for bottled goods, provides the same price for unbottled goods, except as modified by subsequent clauses. These subsequent clauses provide for "negotiations" by which the 1945 price shall be made to reflect changes in the cost of items entering into the production of wine. This specification of what the "negotiations" shall cover is controlling and shows that in effect they amount to *calculations of future cost levels.* A contract fixing price by such a formula, is sufficiently definite.

D. PROVISION FOR PREACCEPTANCE LEAVES CONTRACT VALID.

On the motion for new trial after the first trial defendants also argued that the contract was too indefinite as to unbottled goods because of the provision for preacceptance (R. 79, par. "Fourth"):

> "On quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels if it should desire."

Defendants claim that this clause gives the plaintiff an unlimited right of rejection and that therefore the contract lacks mutuality. In the first place, defendants' interpretation is faulty. The wine is represented as being of a certain quality. The batch already bottled has been preaccepted, and the buyers

are foreclosed from raising any objection to the quality. The remainder *is to be sampled* when bottled. If the buyer approves the *sample* he waives objection to quality *as to the entire lot.*

On the other hand, he has the right to reject the entire lot if the sample is not up to standard. (The standard was set with particular care in the modifying letter attached to the contract—R. 82-3.) In such a case, the seller may sell elsewhere, without incurring liability. Thus the agreement is for approval or disapproval of the entire lot on the strength of *a sample.*

The buyer's action on the sample binds him as well as defendants *as to the entire lot.* In this respect the agreement of the parties deviates from the ordinary rule that the seller warrants the bulk to be the same as the sample. (Civ. Code 1736.) In this respect the contract was therefore more favorable to the seller than the ordinary rule. Both sides were bound by the agreement so there was no lack of mutuality.

But even apart from the element of sampling, the buyers' right of rejection for quality does not create lack of mutuality.

See:

Godlove v. Russell, 184 Or. 445, 293 Pac. 936, 937:

"Respondents were accorded the right to pass upon the question of whether appellant's eggs were of the quality thus defined. This right on respondents' part of approval or rejection because of quality, could not be exercised caprici-

ously but only in good faith, and hence did not render the subject matter indefinite as to amount or quality, nor constitute a condition precedent of such a nature as to invalidate the contract. 1 Williston on Sales (2d Ed.) 353, sec. 191, and cases cited in note 78."

E. SUMMARY.

The contract provides that the prices of unbottled goods shall be fixed by modifying current prices according to changes in cost which might take place in the year 1945. This makes the price sufficiently definite to sustain the contract. The use of the word "negotiations" does not weaken this conclusion. The preacceptance clause likewise leaves this part of the contract valid. In short the parties validly contracted as to the unbottled part of the wine. The trial court therefore erred in withdrawing it from the jury's calculation of damages. Damages should have been submitted upon the full amount of 60,000 cases. If for any reason there should be a new trial, it should be granted with directions to instruct the jury to render a verdict on the entire lot of 60,000 cases.

II. IN ANY EVENT THE TRIAL COURT ERRED IN NOT SUBMITTING THE ISSUE OF DAMAGES UPON THE NUMBER OF CASES SHIPPED DURING 1943 AND 1944.

If it be held that the trial court correctly refused to submit the issue of damages on 60,000 cases, there was nevertheless error in restricting damages to 26,691 cases.

This proposition is covered by plaintiff's second ground of cross-appeal (R. 549):

> "2. Alternatively and in any event, the court should have submitted the issue of damages to the jury upon the basis of the number of cases (approximately 36,000) which were contracted to be shipped during the remainder of the year 1943 and during the year 1944, instead of on the basis of only 26,691."

(And see appendix for requested instructions and exceptions preserving this issue.)

The point of this assignment is that even if the 1945 prices be considered too indefinite, the 1945 prices do not cover the entire balance of 33,309 cases.

Prices through 1944 were fixed definitely. Under the rules of interpretation already noted, any ambiguity as to whether these prices cover unbottled goods sold in 1944, must be resolved in favor of a specific and valid contract. This is contrary to the position taken by the trial court; for submitting the issue of damages upon the basis of 26,691 cases involved a holding that none of the bottled goods had a determinable price even though they might be sold in 1944. The question turns upon the following clauses of the contract (R. 78):

> "Third: The quantities now bottled and stored may be stated approximately as follows: [tables] and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions as herein stipulated. *During the year 1943* dry wines will

> be billed on the basis of Five Dollars and twenty-five cents ($5.25) per case and the sweet wines at Six Dollars ($6.00) per case. * * * *During the year 1944* payment shall be made on the basis of Five Dollars and Fifty Cents ($5.50) per case for dry wines, and Six Dollars and Twenty-five Cents ($6.25) per case for sweet wines * * *
>
> "* * * the balance of the amount of the sale which has not been bottled, *is to be paid for proportionately as between dry wines and sweet wines the same,* but subject to negotiations whereby * * * the prices governing the remainder of the transaction will be determined in the light of conditions existing *during the year 1945.*" (Italics added.)

It is certainly a reasonable interpretation to hold that *this last clause is intended to apply only to sales made in the year 1945.*

What then is the price for *unbottled* goods sold in *1944?* The answer must be found in the clause italicized above: "The balance of the amount of the sale which has not been bottled is to be paid for proportionately as between dry wines and sweet wines the same". In other words, *unbottled* wines sold during 1944 carry the same price as bottled wines sold in the same year. These provisions read together indicate that it was the intention of the parties to contract for the sale of wines over a 3 year period, perhaps averaging around 20,000 cases of wine per year.

The remaining question is, how much wine will be sold by the end of 1944?

This is answered by the provision of paragraph *Second* of the contract (R. 72) that one car a month shall be shipped each month during 1943 and 1944 with the understanding that if plaintiff wanted additional amounts at the holiday season it could have two cars in a particular month. The "holiday season" presumably means Thanksgiving and the Christmas-New Year week. A car is 1500 cases. (R. 217.) Under the modification agreement (R. 82-3) deliveries were to commence approximately 60 days from February 3, 1943. There were thus nine months in 1943 and twelve months in 1944. Two months in each year the plaintiff was to receive two cars; otherwise a car a month. This makes a total of 25 cars, or at the rate of 1500 cases per car, 37,500 cases. The first 26,691 of these are bottled, the rest unbottled. But all come under the 1943 and 1944 price schedule. As to this lot the price was definite even if the 1945 price was too indefinite. Consequently the jury should have been instructed to find damages upon 37,500 cases, at least.

III. ON THE ISSUE OF DAMAGES, THE COURT SHOULD HAVE ADMITTED EVIDENCE OF PRICES OBTAINED BY DEFENDANT ON SALES OF THE WINES IN THE CONTRACT TO OTHER CUSTOMERS.

After the defendants broke their contract with plaintiff, they turned around and sold the same wines to others customers, for prices ranging from $6.50 to $8.50 a case. (See offer of proof of plaintiff, R. 261, 262; plaintiff's exhibit 13A, being a list of defendants' sales and prices—facing R. 266. The de-

fendants' deposition, plaintiff's exhibit 13B, R. 283-295, contains oral testimony as to sales made between the first and second trials.) Testimony to that effect was excluded by the trial court: See R. 258-259, testimony of Jean Bercut,

> "Q. Following the month of April, and particularly the 27th day of April, 1943, did you sell those wines in the open market?
>
> Mr. Naus. Objected to as immaterial and as being wholly outside the issues.
>
> The Court. Sustained.
>
> Mr. Bourquin. We may have an exception to the ruling, your honor.
>
> The Court. Yes."

Similar questions, objections and rulings, for the months following April, appear on R. 259-60.

On R. 255 the court sustained objections to questions as to sales of *similar* wines upon the additional ground that the complaint pleaded only loss of profits.

The court limited plaintiff to loss of profits upon the issue of damages. (See R. 308-11, 318-20.) Plaintiff's position is that defendants' sales were admissible as *an alternative measure of damages* (as was held at the first trial). They are admissible on either one of two theories:

First: Assuming there is no market and no market value for the wines, one measure of damages is the difference between the contract price and the "actual" value. Prices on individual sales by defendants of the same wine are *some evidence* of such value.

Second: Assuming that defendants' sales (of the same wine) on the general market establish a market price, the prices on such sales are admissible to establish the difference between the contract and the market price.

The allegations of the complaint do not limit plaintiff's measure of damages.

We first take up the grounds upon which evidence of defendants' sales is admissible and shall then give the authorities showing that plaintiff's complaint does not limit its proof.

A. PRICES ON SALES BY DEFENDANT ADMISSIBLE TO PROVE VALUE.

1. One measure of damages in absence of market is difference between contract price and actual value.

Where the seller fails to deliver goods which are unobtainable on the general market, there is a variety of rules for measuring damages. Since the goods cannot be bought on the market, they are said to have no market value, even though the particular lot may be readily sold. One measure of damages is analogous to the rule respecting goods which *do* have a market value; namely, to ascertain the value of the unobtainable goods and then fix damages at the difference between the value and the contract price. See:

55 *C.J.* 1161.

"Where the goods have no market value, resort must be had to other elements of value, and the measure of damages has been held to be the difference between the agreed price and the reason-

able or actual value of the goods, which value must be ascertained by the best evidence available.

55 *C.J.* 1174.

"As in the case where the goods have no market value, if the goods cannot be obtained in the open market, the general rule of damages will not apply, and resort must be had to other elements of value. * * *"

To the same effect 46 *Am. Jur.* 811-12.

2. Prices on individual sales are evidence of value.

The prices which a product commands on individual sales are *some evidence* of its actual value. Where no general market price can be established, prices received on such sales are admissible in evidence. The *Corpus Juris* passage quoted above continues as follows:

55 *C.J.* 1161.

"The value of the goods may be determined * * * by the advanced price at which the buyer has agreed to sell them, or the price at which the buyer had sold like goods just prior to the breach * * *."

Individual sales being evidence of value, it makes no difference by whom the sales are made. As a matter of logic, sales by the buyer and sales *by the seller to third persons* are equally relevant. While there are comparatively few cases on this precise point, those which we have found sustain our position. See the following:

a. Sales by defaulting seller.

Granberry v. Frierson (1873), 61 Tenn. (2 Baxter) 326, where the defendant broke his contract with plaintiff and sold the goods to other customers, the court said,

> (p. 328.) "* * * In an action therefor the measure of the plaintiff's damages would be the difference between the agreed price and that received by the defendant, less the reasonable costs and expenses of the resale."

> *Duncan v. McMahan* (1856), 18 Tex., 597, 609.

> "* * * The jury had a right to adopt the estimate which they deemed nearest the truth; and they probably estimated the quantity at forty-four bales, weighing five hundred pounds each; the price contracted to be paid for it; * * * and its value in Houston at what it is proved to have been actually sold for there * * * . These estimates make the difference between the price at which the plaintiff purchased, and that which the defendant afterwards sold (which was the lowest estimate of value the jury was warranted in finding) the precise amount of the verdict. That the plaintiff was entitled to recover that amount does not admit of question. * * *."

To the same effect: *Brent v. Richards* (1846), 43 Va. (2 Gratt.), 539, 544.

In *Moss v. Sherburne* (1926), 11 Fed. (2d) 579 (CCA1), the seller broke his contract to deliver to the buyer. The buyer then obtained the goods *under a new contract from the same seller.* In other words, there was a sale by the defaulting seller, but to the

original buyer rather than to a third person. *Held:* That the price under the new contract was evidence of value. Plaintiff could recover the difference between this and his original contract price. The court stated:

Moss v. Sherburne, 11 Fed. (2d) 579, 582.

> "There was no error in admitting the price in the second contract as evidence of the market value of the sugar described under the first contract at Buenos Aires on the date of the breach of this contract * * *."

Under these cases the prices received by the defendants on sales to third persons, were relevant as tending to show value of the wine at the dates of sale.

We now give other cases admitting evidence of price and individual sales.

b. Sales or prospective sales by buyer.

Sales or contracts for sale by the buyer are similarly competent to prove actual value:

See *Western Indemnity Co. v. Mason M., etc.,* 56 Cal. App. 355, 363.

> "Further objection is made that the trial court erred in admitting in evidence contracts made by plaintiff for the sale of potash which it manufactured from the slops purchased from the defendant. * * *
>
> (p. 364.) The contract here sued on was one dealing with the sale of slops. This commodity was not obtainable elsewhere. There was, so far as the record shows, no market price for it. * * *

> In such a case the authorities are clear that where a breach occurs under such circumstances the vendor is liable on his contract for any damages resulting to the vendee arising from a failure to deliver the property where such damages are not remote and speculative, and that *his contract is admissible to prove value.* * * * Here the contracts were offered and received not for the purpose of proving the amount received, for the product, but for the sole and limited purpose of tending to show that it could be sold and that it had some market value * * * *this evidence was responsive to the issue that the product had a value.* * * * The trial judge, in referring thereto, frequently expressed his view that *evidence of what an article could be sold for was some evidence of market value.*" (Italics added.)

This case uses "market value" even with reference to goods not obtainable on the general market. The last sentence—"evidence of what an article could be sold for"—is broad enough to include sale by the seller as well as by the buyer. (See Subd. "a", supra.) So in the present case, the evidence which plaintiff offered on prices was admissible to prove value. To the same effect:

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 71 Ind. App. 401, 118 N.E. 360, 368;

Pape v. Ferguson, 28 Ind. App. 298, 62 N.E. 712, 714;

Trigg v. Clay, 88 Va. 330, 13 S.E. 434 (at 434).

3. **Summary.**

Evidence of prices at which the sellers (defendants) sold the wine to other customers was admissible to prove value.

B. SALES BY DEFENDANTS TENDED TO ESTABLISH MARKET VALUE.

1. **Sales by seller tend to establish market price.**

So far we have discussed the case according to the theory on which it was tried—that the wine was unobtainable on the market and therefore had no market price. Had plaintiff attempted to supply itself after the breach, plaintiff would have had to buy the same wine from the defendants, at defendants' prices. The question is, whether sales by the defendants of the very products about which the parties contracted, establish a market price. What little authority there is on this point is in the affirmative. In the first place, a purchase by the buyer from the seller under a new agreement is evidence of *market price. Moss v. Sherburne,* 11 Fed. (2d) 579, 582, quoted supra. In the second place, market price may be established by sales of much smaller quantities than what the buyer originally contracted to buy. See 55 *C.J.* 1142, N. 72, citing

Faulkner v. Closter, 79 Iowa 15, 44 N. W. 208, which applies this rule.

It is therefore submitted that when defendants threw the wine upon the general market they thereby established a market price. Plaintiff could prove this price in order to show the difference between market and

contract price. (Sales Act Sec. 67, Civ. Code Sec. 1787.)

2. Sales by defendants relevant as to date.

The sales by the defendants took place at various dates after the anticipatory breach of April 27, 1943. (See plaintiff's Exhibit 13A for identification, opposite R266, giving dates of sales through February 26, 1944.) The market price at these dates is relevant, since the plaintiff's contract was for installment deliveries throughout the years 1943-44-45. The breach was an anticipatory breach. In such cases the measure of damages is the difference between the contract price and the market price at the place and *time of delivery*. See Civ. Code Sec. 1787(3): where time of delivery is fixed, measure of damages is difference between contract price and market price at time of delivery; also,

> *U. S. Trading Co. v. Newmark,* 56 Cal. App. 176, 191;
>
> *Filice & Perrelli C. Co., Inc., v. Walton,* 95 Cal. App. 7, 11;
>
> *Meyer v. Sullivan,* 40 Cal. App. 723, 732;
>
> *Segall v. Finlay,* 245 N.Y. 61, 156 N.E. 97, 98 (Uniform Sales Act);
>
> *Schopflocher v. Zimmerman,* 240 N.Y. 507, 148 N.E. 660, 661 (same);
>
> *Goldfarb v. Campe,* 164 N.Y. Supp. 583, 589 (same);
>
> *Monaghan v. Alexander,* 76 Utah 81, 287 Pac. 908 (same);

Wilson Motor Co. v. Lamping Motor Co., 194 Wash. 416, 78 Pac. (2d) 559;

Woerman v. McKinney-Guedry Co., 174 Ky. 521, 192 S.W. 684, 685, 688;

Alpha Portland Cement Co. v. Oliver, 125 Tenn. 135, 140 S.W. 595, 596.

C. COMPLAINT DOES NOT LIMIT PLAINTIFF'S PROOF.

The amended complaint asked for lost profits. (R. 13.) But that does not limit the measure or proof of damages. The measure of damages is a legal conclusion flowing from the cause of action. The court will apply whatever measure the plaintiff is entitled to, even if the complaint states an incorrect measure (which this complaint did not). Compare:

Hulen v. Stuart, 191 Cal. 562, 569 (top).

"Even though the plaintiff in stating her cause of action had mistaken the measure of the recovery which she sought, it would have made no difference."

W. C. Cook & Co. v. White Truck Tr. Co., 124 Cal. App. 721, 726;

Mitchell v. Clark, 71 Cal. 163, 167, 168;

Olds & Stoller v. Seifert, 81 Cal. App. 423, 427.

IV. SUMMARY.

The contract made the price of unbottled goods sufficiently definite. Damages should have been computed upon the entire lot of 60,000 acres. At all events, the price was fixed throughout the years 1943

and 1944. At the very least damages should have been based upon the wine to be sold during those years (about 37,500 cases).

The prices which defendants obtained on sales of the wines covered by the contract, to third parties were relevant to prove either actual (non-market) or market value.

Plaintiff does not desire a third trial of this case. But if there is a third trial the District Court should be directed to submit the issue of damages to the jury upon the entire 60,000 cases, and to admit the heretofore excluded evidence of defendants' sales.

Dated, San Francisco, California,
November 29, 1944.

Respectfully submitted,
Alfred F. Breslauer,
Thelma S. Herzig,
M. Mitchell Bourquin,
George Olshausen,
Attorneys for Plaintiff and Cross-Appellant.

(Appendix Follows.)

Appendix.

(Material not quoted in body of brief.)

PLAINTIFF'S PROPOSED INSTRUCTIONS.

(R. 25-6.) Plaintiff's Instruction No. 1.

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut, doing business as P & J Cellars, defendants. This action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendant's contract to sell and deliver 60,000 cases of wine.

Given. St. Sure, D. J.

Although this instruction is marked "given" it was modified by striking out the last eight words. See brief p. 8 and the court's charge infra.

Plaintiff's Instruction No. 1-A.

(If Instruction No. 1 is not given as is, respecting number of cases, plaintiff proposes the following alternative instruction):

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff, and Pierre and Jean Bercut, doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver one carload a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.

Refused. A. F. St. Sure, D. J.

(R. 35-8.) Plaintiff's Instruction No. 15.

The court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 60,000 cases of wine, and you find that said profit could reasonably have been expected, and if

you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding $237,750.00 as and for general damages.

Shoemaker v. Acker, 116 Cal. 239;
Stephany v. Hunt Bros. Co., 62 Cal. App. 638;
Robinson v. Rispin, 33 Cal. App. 536;
Caspary v. Moore, 21 Cal. App. (2d) 694.

Given as modified. St. Sure, D. J.

Plaintiff's Instruction No. 15-A.

(If Instruction No. 15 is not given in the form requested as to the number of cases then the following instruction):

The court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on the wine which the defendants agreed to ship in the years 1943 and 1944, and you find that said profit could reasonably have been expected and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff you will find general damages for the plaintiff in an amount not exceeding $237,750.00.

Refused. St. Sure, D. J.

Plaintiff's Instruction No. 16.

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff is entitled to the difference between the contract price and the market price for 60,000 cases of wine as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding $237,750.00, as and for general damages, the amount prayed for in the complaint.

U. S. Trading Co. v. Newmark, 56 Cal. App. 176, 191;
Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567;
California Civil Code, Section 3300;
California Civil Code, Section 1787;
Monaghan v. Alexander, 76 Utah 81, 287 Pac. 908 (Sales Act);
Schopflocher v. Zimmerman, 240 N. Y. 507, 148 N. E. 660 (Sales Act, Cardozo, J.);
Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97 (Sales Act).

Refused. A. F. St. Sure, D. J.

Plaintiff's Instruction No. 16-A.

(If Instruction No. 16 is not given in the form requested as to the number of cases, then the following instruction):

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff is entitled to the difference between the contract price and the market price for the number of cases which defendants agreed to deliver during the years 1943 and 1944 as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding $237,750.00 as and for general damages the amount prayed for in the complaint.

Refused. St. Sure, D. J.

(R. 64.) Defense Request No. 39.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or

mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4,500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4,500 cases.

Lawrence v. Porter, 6 Cir., 63 Fed. 62, 66, and cases there cited;

Brookridge Farm v. U. S., 27 F. Supp. 909, 910-911.

Given. St. Sure, D. J.

(R. 65.) Defense Request No. 40.

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to

plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits.[1] The only damage to plaintiff through paying cash in advance would be limited to interest for the use of its money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.[2]

Given. St. Sure, D. J.

[Endorsed]: Filed Mar. 22, 1944.

(R. 478.) The Court. I shall give plaintiff's instruction No. 15 amended as follows: Have you got it?

Mr. Naus. Yes, your Honor.

The Court. Striking out on line 11 the figure "60,000" and inserting in lieu thereof "26,691." And striking out on line 12, after the word "inspected," the following words: "and if you find that said wines are unobtainable on the market."

Mr. Naus. Those words are being stricken out?

The Court. Yes. "And if you find said wines are unobtainable on the market," being stricken out, and inserting after the word "exceeding" on line 15 the

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[1]Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117.

[2]Warren v. Stoddart, supra;

Note, 46 A.L.R. 1192, at 1194; and California cases at 1195;

Lawrence v. Porter, 6 Cir., 63 Fed. 62.

words "the amount of any such profit." Striking out the figures, "237,750." Have I made that clear?

Mr. Naus. Yes, your Honor.

The Court. "If your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profits as and for general damages," striking out the figures and the dollar sign, "$237,750."

I am also giving defendants' request No. 39.

I shall give defendants' request No. 40.

(R. 479.) The Court. Just a minute. I expect to refuse to give the following: Defendants' request No. 23, defendants' request No. 26, defendants' request No. 27, defendants' request No. 24, defendants' request No. 25, defendants' request No. 13, defendants' request No. 15, defendants' request No. 16, defendants' request No. 22, defendants' request No. 29, defendants' request No. 30, defendants' request No. 32, defendants' request No. 33, defendants' request No. 34, defendants' request No. 37, plaintiff's request No. 1(a), plaintiff's No. 4, plaintiff's No. 5, plaintiff's No. 5(d), plaintiff's No. 13, plaintiff's No. 14, plaintiff's No. 16(a), plaintiff's No. 17, plaintiff's No. 15(a), plaintiff's No. 16.

(R. 492.) Then in the refusal of our requests we except to the refusal of 1-A, 4, 5, 5-B, 13, 14, 15-A——

The Court. 16-A?

Mr. Olshausen. Yes, 16——

The Court. 16-A.

Mr. Olshausen. 16-A I have here, and 16 is, too; I haven't come to it yet. Yes. 16. That simply again

is the same point which came up, in part, at least, on the granting of the first motion for a new trial, and 16 is the same way, 16-A. That is all.

(R. 505.) Tuesday, March 21, 1944, 10:00 o'clock A. M.

The Court. Park, Benziger & Co. v. Bercut, on trial.

Mr. Olshausen. There is one other matter. It is that in case it is necessary for the record we state that the grounds upon which we have taken exception to the instructions refused or modified—we are of the opinion and take the position that the instructions as requested were correct statements of the law and supported by the evidence.

CHARGE TO THE JURY.

(R. 508.) The Court (orally). This is an action between Park, Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut, doing doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract.

(R. 521-3.) I instruct you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 26,691 cases of wine, and you find that said profit could reasonably have been expected, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profit.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract

must accordingly be reduced to the extent of the three carloads or approximately 4500 cases.

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits. The only damage to plaintiff through paying cash in advance would be limited to interest for the use of the money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.